The State Minerals Management Authority, Sarawak & Ors v Gegah Optima Resources Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01(NCVC)(A)-143–03 OF 2019
MARY LIM, NANTHA BALAN JJCA, SUPANG LIAN J
31 MARCH 2020

Civil Procedure — Judicial review — Appeal against — Appellants rejected respondent's application for mining lease without giving reasons — Respondent filed judicial review — High Court allowed respondent's application in part — High Court granted certiorari quashing appellants' decisions and mandamus ordering appellants to reconsider respondent's application for mining lease — Whether there was common law duty to provide reasons for decisions — Whether there was procedural impropriety and illegality — Whether there was requirement under s 44 of the Minerals ordinance 2004 for appellants to provide reasons — Whether there was a breach of natural justice — Whether decisions violated Wednesbury principles — Whether decisions lawful — Minerals Ordinance 2004 s 44

The respondent was granted a general prospecting licence ('GPL') under s 22 of the Minerals Ordinance 2004 ('the Ordinance') giving it the right to prospect for metals and minerals over a 15,346-hectare in Sungei Tutuh, Baram, Miri, Sarawak, for two years. During the subsistence of the GPL, the respondent applied to the first appellant to be granted mining leases in four places within the GPL area for a period of 20 years. The first appellant rejected the application without giving any reason ('the first decision'). The respondent then lodged an appeal to the first appellant for the latter to reconsider its decision but again the first appellant rejected the application without giving any reason ('the second decision'). The respondent applied for judicial review against the first and second decision which it said was illegal, procedurally improper, in breach of natural justice and irrational. The High Court granted an order of certiorari quashing the appellants' decisions and a further order of mandamus directing the appellants to reconsider or re-determine the respondent's application for a mining lease. The appellants appealed; and the respondent cross-appealed over the refusal of the learned judge to vary the terms of the order of mandamus granted, that instead of directing the appellants to reconsider or re-determine the respondent's applications for mining leases, that the appellants or any of them be compelled to approve the grant of the mining leases sought. The issues raised were: (a) common law could not override statute, that was, the Minerals Ordinance 2004; (b) there was no procedural impropriety and no illegality; and (c) the reasons for refusal involved policy considerations.

Held, allowing the appeal, setting aside the decision of the High Court, and dismissing the cross-appeal with no order as to costs:

(1) It was clear that there were no requirements, whether in s 44 of the Ordinance or elsewhere in the Ordinance, to hear the respondent before a decision was taken or for reasons to be given in any decision made. The grant of a mining lease was a matter of discretion and this discretion was to be exercised in accordance with s 44(4) of the Ordinance. This provision was sufficient for ensuring that decisions reached were proper, well-informed and absent of arbitrariness. The procedure in s 44 of the Ordinance was quite elaborate and comprehensive, enough to ensure the more important element that lay at the heart of natural justice, that was, the right to present one's case, was observed. The non-provision of a right to hear the respondent, whether orally or in any form before the impugned decisions were taken, could not and did not render these decisions invalid (see paras 50, 54 & 56).

(2) A reasoned decision was really an additional constituent of the concept of fairness as opposed to being in itself and on its own, without more, a common law duty to provide reasons. There was no universal common law duty to give reasons. It was a matter of fairness and the trend towards increased openness proceeded on a case-by-case basis. In a case where there were no express or implied requirement to provide reasons, and it could not be inferred such a power too, then it was whether there were exceptional circumstances for this requirement and whether there was a 'cry out for an explanation'. Therefore, the appellants' failure to state reasons at the material time was not fatal (see paras 65–66).

(3) The appellants had explained that the refusal was because the subject areas involved forest and water catchment reserves; and that there were overriding state government policy in discouraging the mining of coal in areas where it could cause adverse environment effects. In addition, even by excluding the water catchment areas, the areas applied for would still overlap the existing *gazetted* Batu Belah Forest Reserve and existing provisional lease of lot APOH Land District issued to Formasi Abadi Sdn Bhd. The learned judge failed to evaluate whether the reasons disclosed by the authority and the other appellants were cogent, reasonable, rational, and valid. The court in the present appeal found that these reasons were by no means irrational or unreasonable in the *Wednesbury* sense (see paras 71–75 & 87).

(4) It was clear that the reasons for the first appellant's refusal were in fact the very same reasons or matters that the respondent itself had raised in its letters of appeal/review/reconsideration, addressing and offering alternative solutions so as to procure a positive reply from the appellants. The respondent was fully aware of the underlying conditions of the areas over which mining leases were sought. Had the learned judge examined

the affidavits filed, as he was required to, His Lordship would have seen that the respondent's complaints were more of form than substance; that the appellants had perfectly valid reasons for their decisions and those reasons were known to the respondent at all material times. No rule of natural justice had been breached, there was no prejudice suffered; and the respondent's complaints were in fact unreasonable and unwarranted (see paras 84–86).

(5) There could not be procedural impropriety where all that the appellants had done was to observe the procedural rules of the Ordinance. In totality, the decisions did not violate the rules of natural justice as alleged, and the decisions were lawful and did not violate any *Wednesbury* principles (see paras 3 & 92).

[Bahasa Malaysia summary

Responden diberi lesen pencarian umum ('GPL') di bawah s 22 Ordinan Mineral 2004 ('Ordinan') yang memberikannya hak untuk mencari logam dan mineral di atas kawasan berkeluasan 15.346 hektar di Sungei Tutuh, Baram, Miri, Sarawak, selama dua tahun. Dalam masa GPL berkuatkuasa, responden mengemukakan permohonan kepada perayu pertama untuk diberikan pajakan perlombongan di empat tempat dalam kawasan GPL selama 20 tahun. Perayu pertama menolak permohonan tersebut tanpa memberikan alasan ('keputusan pertama'). Responden kemudian mengemukakan rayuan supaya perayu pertama mempertimbangkan semula keputusannya tetapi sekali lagi perayu pertama menolak permohonan tersebut tanpa memberikan alasan ('keputusan kedua'). Responden memohon semakan kehakiman terhadap keputusan pertama dan kedua yang dikatakannya tidak sah, tidak wajar secara prosedur, melanggar keadilan semula jadi dan tidak rasional. Mahkamah Tinggi memberikan perintah certiorari untuk membatalkan keputusan perayu-perayu dan selanjutnya perintah mandamus yang mengarahkan perayu-perayu untuk mempertimbangkan kembali atau menentukan kembali permohonan responden untuk diberikan pajakan perlombongan. Perayu-perayu merayu; dan responden membuat rayuan balas atas penolakan hakim yang bijaksana untuk mengubah syarat perintah mandamus yang diberikan, bahawa daripada mengarahkan perayu-perayu untuk mempertimbangkan semula atau menentukan semula permohonan responden untuk pajakan perlombongan, bahawa perayu atau salah satu daripadanya diperintahkan untuk meluluskan pemberian pajakan perlombongan seperti yang dimohon. Isu-isu yang dibangkitkan adalah: (a) 'common law' tidak dapat mengatasi undang-undang bertulis, iaitu Ordinan Mineral 2004; (b) tidak terdapat penyelewengan prosedur dan ketidakpatuhan undang-undang; dan (c) alasan penolakan melibatkan pertimbangan polisi.

Diputuskan, membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi, dan menolak rayuan balas tanpa perintah berkenaan dengan kos:

(1) Jelas bahawa tidak ada syarat, sama ada dalam s 44 Ordinan atau di dalam mana-mana peruntukan lain dalam Ordinan tersebut, untuk mendengar responden sebelum keputusan diambil atau untuk alasan diberikan dalam setiap keputusan yang dibuat. Pemberian pajakan perlombongan adalah perkara di bawah budi bicara dan budi bicara ini harus dilaksanakan berdasarkan s 44(4) Ordinan. Peruntukan ini cukup untuk memastikan keputusan yang diambil adalah betul, tepat dan tidak diberikan secara sewenang-wenangnya. Prosedur dalam s 44 Ordinan cukup terperinci dan komprehensif, cukup untuk memastikan elemen yang terpenting dalam keadilan semula jadi, iaitu hak untuk mengemukakan kes, dipatuhi. Kegagalan untuk memberikan hak responden untuk didengari, sama ada secara lisan atau dalam bentuk apa pun sebelum keputusan yang dibuat diambil, tidak dapat dan tidak menjadikan keputusan ini tidak sah (lihat perenggan 50, 54 & 56).

(2) Keputusan yang beralasan sebenarnya merupakan unsur tambahan dari konsep keadilan dan bukan tanggungjawab 'common law'. Tidak terdapat kewajiban 'common law' yang universal untuk memberikan alasan. Ini adalah masalah keadilan dan kecenderungan kepada peningkatan keterbukaan bergantung kepada sesuatu kes. Dalam kes di mana tidak ada syarat tersurat atau tersirat untuk memberikan alasan, dan tidak dapat disimpulkan juga syarat tersebut, maka dalam keadaan tersebut bergantung kepada sama ada terdapat keadaan yang luar biasa untuk menggunakan syarat ini dan sama ada terdapat 'cry out for an explanation'. Oleh itu, kegagalan perayu-perayu untuk menyatakan alasan pada waktu yang material adalah tidak fatal (lihat perenggan 65–66).

(3) Perayu telah menjelaskan bahawa penolakan tersebut adalah kerana kawasan-kawasan yang dimohon merangkumi hutan simpan dan tadahan air; dan kerana terdapat polisi Kerajaan Negeri yang lebih penting dalam mencegah perlombongan arang batu di kawasan-kawasan di mana ia dapat menyebabkan kesan buruk terhadap alam sekitar. Di samping itu, walaupun dengan mengecualikan kawasan tadahan air, kawasan yang dimohon masih akan bertindih dengan Hutan Simpan Batu Belah yang telah diwartakan dan pajakan sementara yang sedia ada bagi lot Daerah APOH yang diberikan kepada Formasi Abadi Sdn Bhd. Hakim yang bijaksana gagal menilai sama ada alasan yang dinyatakankan oleh pihak berkuasa dan perayu yang lain adalah meyakinkan, wajar, rasional, dan sah. Mahkamah dalam rayuan ini mendapati bahawa alasan-alasan ini bukanlah tidak rasional atau tidak masuk akal dalam maksud 'Wednesbury' (lihat perenggan 71–75 & 87).

(4) Jelas bahawa alasan penolakan perayu pertama sebenarnya adalah alasan atau masalah yang sama yang ditimbulkan oleh responden sendiri dalam surat rayuan/semakan/pertimbangan semula, menyatakan dan

menawarkan penyelesaian alternatif untuk mendapatkan jawapan positif dari perayu. Responden mengetahui sepenuhnya syarat-syarat yang mendasari kawasan di mana pajakan perlombongan dimohon. Sekiranya hakim yang bijaksana meneliti afidavit yang difailkan, sebagaimana yang di kehendaki ke atasnya, hakim yang bijaksana akan melihat bahawa aduan responden lebih kepada luaran daripada pengisian; bahawa perayu-perayu mempunyai alasan-alasan yang sah untuk keputusan mereka dan alasan-alasan tersebut diketahui oleh responden pada setiap masa yang material. Tidak ada peraturan keadilan semulajadi yang dilanggar, tidak terdapat prejudis; dan aduan responden sebenarnya tidak masuk akal dan tidak beralasan (lihat perenggan 84–86).

(5) Tidak mungkin terdapat ketidaktentuan prosedur apabila semua yang dilakukan oleh perayu-perayu adalah mematuhi peraturan prosedur Ordinan. Secara keseluruhan, keputusan tersebut tidak melanggar peraturan keadilan semulajadi seperti yang dihujahkan, dan keputusan tersebut sah dan tidak melanggar prinsip-prinsip 'Wednesbury' (lihat perenggan 3 & 92).]

Cases referred to

Abdul Salam bin Husin v Majlis Angkatan Tentera & Anor [2011] 2 MLJ 573, FC (refd)

Ambiga a/p Sreenevasan v Director of Immigration, Sabah, Noor Alam Khan bin A Wahid Khan & Ors [2018] 1 MLJ 633, CA (refd)

Breen v Amalgamated Engineering Union & Ors [1971] 2 QB 175, CA (refd)

Doody v Secretary of State for the Home Department [1990] All ER 123, HL (refd)

Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia [2013] 2 MLJ 321, FC (refd)

Dr Stefan v The General Medical Council [1999] 1 WLR 1293, PC (distd)

Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152; [1975] 1 LNS 72, FC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1; [1999] 5 CLJ 65, FC (distd)

Malaysia Airline System Bhd v Wan Sa' adi @ Syed Sa' adi bin Wan Mustafa [2015] 1 MLJ 757; [2015] 1 CLJ 295, FC (refd)

Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor v Ang Ming Lee & Ors and other appeals [2018] 4 MLJ 545; [2018] 9 CLJ 640, CA (refd)

Minister of Labour, Malaysia v Chan Meng Yuen & Another Appeal [1992] 2 MLJ 337, SC (refd)

Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia [2017] 6 MLJ 586; [2017] 10 CLJ 36, CA (refd)

Najar Singh v Government of Malaysia & Anor [1976] 1 MLJ 203, PC (refd)

A *Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor* [2016] 2 MLJ 495; [2016] 5 CLJ 250, CA (refd)
Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor [2018] 6 MLJ 670, CA (refd)
B *Public Services CommisPublic Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
C *R v Royal Borough of Kensington and Chelsea; ex p Grillo* [1996] 28 HLR 94, PC (refd)
R v Secretary of State for Trade and Industry, ex p Lonrho plc [1989] 1 WLR 525; [1989] 2 All ER 609, HL (refd)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487, HC (refd)
D *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2018] 3 MLJ 466; [2018] 4 CLJ 361, CA (refd)

Legislation referred to

E Courts of Judicature Act 1964 s 25(2), Schedule
Federal Constitution arts 132, 135(2), 140(1), 150, Part II
Minerals Ordinance 1958 (Cap 83) (repealed by Minerals Ordinance 2004)
Minerals Ordinance 2004 (Cap 56) ss 2, 5, 6, 7, 8, 22, 25, 25(2), 32, 32(2), (3), 43(2), 44, 44(1), (2), (3), (4), (5), (5)(b), 46, 50, 54, 125
F Rules of Court 2012 O 53 r 3(7)

Appeal from: Civil Suit No KCH-13NCVC-11/11 of 2017(HC3) (High Court, Kuching)

G *Azreen Fasya Mohamad Abu Bakar (Nur Azhar Bujang with her) for the appellants.*
Albert Tang Yew Liong (Andy Tan Tung Sii with him) (Andy and Assoc) for the respondent.

H **Mary Lim JCA (delivering judgment of the court):**

INTRODUCTION

I **[1]** The appellants refused to approve the respondent's application for a mining lease over certain lands. On 13 February 2019, the respondent succeeded in its application for a judicial review of the appellants' decisions. The High Court granted an order of certiorari quashing the appellants' decisions and a further order of mandamus directing the appellants to reconsider or re-determine the respondent's application for a mining lease.

[2] The appellants appealed; and the respondent cross-appealed over the refusal of the learned judge to order a mandamus in the particular terms sought.

[3] Upon consideration of the submissions of both parties before us, the grounds for His Lordship's decision, and the relevant law, we allowed the appeal holding that the decisions did not violate the rules of natural justice as alleged, and that the decisions were lawful and did not violate any *Wednesbury* principles. We further dismissed the cross-appeal. These are our reasons in full.

THE GENERAL PROSPECTING LICENCE

[4] The respondent is principally in the business of prospecting and developing coal mines. It is also a holder of a general prospecting licence ('GPL') issued by the fourth appellant. A GPL offers the holder a right to prospect for metals and minerals other than mineral oils. The GPL was issued under s 22 of the Minerals Ordinance 2004 (Cap 56) which repealed and replaced the Minerals Ordinance 1958 (Cap 83) ('Minerals Ordinance'). The GPL was valid for two years from 23 May 2014 and it expired on 22 May 2016. The GPL covered an area totaling 15,346 hectares at Sungai Tutuh, Baram, Miri. It is an undisputed fact that save for a relatively small area in the north, that 15,346 hectares comprised almost entirely of the Batu Belah Forest Reserve vide *Gazette* Notification No 1144 of 16 December 1936 and a provisional lease under Lot 4 Apoh Land District.

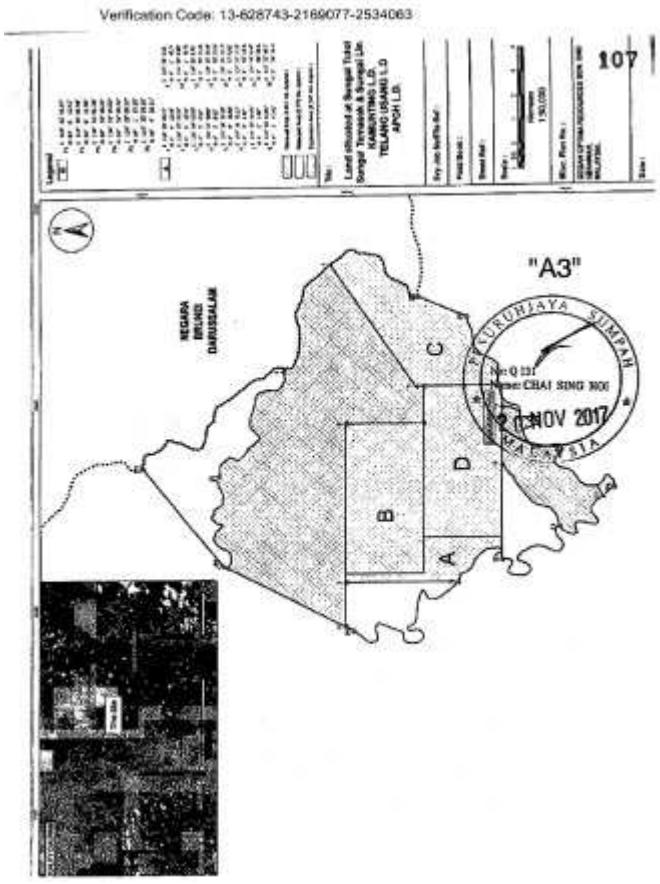
[5] Using its GPL, the respondent carried out exploration and prospecting and found 'substantial mineable coal reserves' in four areas within the 15,346 hectares.

APPLICATIONS FOR MINING LEASES

[6] On 24 November 2015 and 5 May 2016, the respondent submitted a total of four applications for mining leases to the first appellant. All four applications were made under s 44 of the Minerals Ordinance and all four were for a term of 20 years each over four separate plots at Sungai Tutuh, Baram, Miri.

[7] All these four plots were within the 15,346 hectares of the GPL. On 24 November 2015 the respondent also applied for renewal of the GPL. The details of the four areas identified by the respondent as plots A, B, C and D in a plan annexed to its applications are as follows:

No	Name	Size (hectares)	Estimated mineable coal reserves (tonnes)	Estimated royalty to government based on existing rates (RM)
1	Area A	550	8,000	932,000,000
2	Area B	2,000	38,000,000	
3	Area C	1,800	29,000,000	
4	Area D	2,000	41,500,000	



[8] By letter dated 16 May 2017, the first appellant refused to approve all four applications under s 44(1) of the Minerals Ordinance — see p 145 of the record of appeal. No reasons were given for the rejection. The respondent also treated this letter as a rejection of their application for renewal of the GPL vis a vis 'the remaining unexplored of (sic) 6597 hectares'.

[9] The respondent appealed vide letter dated 13 June 2017 (p 147 of the record of appeal). It appealed to the Chief Minister/Minister of Resource Planning for a 'review/reconsideration of the applications for mining lease and the GPL renewal'. In that same letter, the respondent stated that they 'understand the proposed mining leases encompassed some water catchment areas' and that it was 'fully agreeable that the boundaries of these proposed mining leases be realigned to exclude such water catchment areas'. The respondent further alluded to the fact that its GPL was approved over a forest reserve and that the forest reserve areas had been fully harvested by licenced timber companies as approved by forestry department, that these areas are now under tree replanting program but that as per EIA specific terms and conditions, it undertakes to replant and rehabilitate the mined areas after mining and to hand back the areas to the forestry department upon completion of rehabilitation.

[10] There was no response to this letter of appeal.

[11] The respondent sent another letter of appeal also to the Chief Minister cum Minister of Resource Planning. This time, in the letter dated 24 July 2017, the respondent proposed that the letter of rejection dated 16 May 2017 be replaced with 'diluluskan dengan syarat'. Essentially, it was proposed that Area A of 576 hectares be excluded and that Area D be reduced to less than 1976 hectares. Both of these proposals were to overcome the concerns over the water catchment areas. As for Areas B and C, the respondent wanted these to be maintained contending that mining activities over forest areas and alienated land subject to rehabilitation works, as per EIA requirements, are permitted under the Minerals Ordinance.

[12] Unfortunately, there was again no response. So, the respondent sent yet another appeal. This time, by letter dated 5 September 2017, the respondent reiterated its earlier position whilst highlighting the fact that it had invested substantial monies in operationalising the GPL requirements and that the state would benefit from royalty collected from the mining activities.

[13] The appellants finally responded. By letter dated 21 August 2017, the first appellant refused the respondent's application for mining lease(s). No reasons were given.

APPLICATION FOR JUDICIAL REVIEW

[14] The respondent filed an application seeking orders of certiorari to quash both the decisions dated 16 May 2017 and 21 August 2017; and a mandamus directing the first appellant to grant the mining lease or alternatively to rehear and re-determine its application. The respondent

challenged the decisions as being in breach of the rules of natural justice, not in accordance with law and with the provisions of the Minerals Ordinance, that the decisions were irrational, or had taken into account irrelevant considerations or had failed to take into account relevant considerations or that the appellants had asked themselves the wrong questions or had misconstrued the provisions of the Minerals Ordinance.

[15] The respondent contended that by reason of being issued the GPL which it had utilised to expend time, effort and expense in exploring and prospecting for coal reserves after which it had found such reserves, the appellants owe the respondent a duty to consider the applications for mining leases under s 44 of the Minerals Ordinance fairly and in accordance with the rules of natural justice.

[16] The respondent also contended that it had a legitimate expectation that the appellants will consider the applications fairly and in accordance with the rules of natural justice. In particular, before any decision is reached, the appellants ought to have:

(a) informed the respondent in writing if any of the documents relating to the applications is not in order or insufficient so as to allow the respondent a fair and reasonable opportunity to remedy or submit the same;

(b) informed the respondent in writing if any of the comments and recommendations in the report of the third appellant under s 44(1) of the Minerals Ordinance is adverse to the respondent and allow the respondent a fair and reasonable opportunity to correct or contradict the same; and

(c) considered the respondent's applications fairly and in accordance with s 44 of the Minerals Ordinance.

[17] The reliefs sought are as follows:

(a) an order of certiorari to quash the decision of the first respondent as contained in its letters dated 16 May 2017 and 21 August 2017 rejecting the applicant's applications for mining leases over part of the areas under the applicant's general prospecting licence No 01/2014 at Tutoh, Baram, Miri;

(b) an order of mandamus to compel the respondents or any of them to approve the grant of mining leases to the applicant over part of the areas under the applicant's general prospecting licence No 01/2014 at Tutoh, Baram, Miri and more particularly as described as Areas B, C and D as shown in the Plan annexed to this application and marked as 'A';

(c) alternatively, an order of mandamus to compel the respondents or any of them to reconsider or re-determine the applicant's applications for the grant of mining leases over part of the areas under the applicant's general prospecting licence No 01/2014 at Tutoh, Baram, Miri and more particularly as described as Areas B, C and D as shown in the Plan annexed to this application and marked as 'A' after the applicant has been afforded a fair and reasonable opportunity to:

(i) remedy or submit any necessary documents in relation to the said applications if the documents is not in order or insufficient; and

(ii) make representations in relation to any of the comments and recommendations in the report of the third respondent under s 44(1) of the Minerals Ordinance; if any of those comments and recommendations is adverse to the applicant;

(d) further or alternatively, damages to be assessed;

(e) that the costs of this application be provided for; and

(f) such further or other relief as this honourable court deems fit.

[18] An extension of time was granted for the application for leave under O 53 r 3(7) of the Rules of Court 2012 to move the court for the various orders sought. Thereafter, the matter was heard on its merits. After a full hearing with affidavits exchanged, the application was allowed.

[19] The appellants explained through their affidavits that the first appellant, the authority in whom the Minerals Ordinance had vested the power and discretion to decide on applications for mining leases, had made the impugned decisions under ss 44(5)(b) and 46, properly and legally upon due consideration of the recommendations and comments from various departments and relevant agencies. Those recommendations are as follows:

(a) area applied for affected the existing Batu Belah Forest Reserve (Permanent Reserve Estate) — see GN No 1144 dated 16 December 1936;

(b) area applied for affected the existing Marudi Water Catchment areas — see official memorandum from Director of Forest dated 25 April 2016;

(c) area applied for is within the Long Panai (Gravity Feed) Water Catchment area and Rural Water Intake point — see letter dated 23 February 2016 from Natural Resources and Environment Board, Sarawak; and

(d) part of the land applied for is held under a provisional lease.

[20] The Lands and Surveys Department of Sarawak had expressed similar

comments through its letter dated 21 February 2017 as follows:

Areas A & B

i. The areas of land affected under the gazetted area applied for affected the existing Batu Belah Forest Reserve [Permanent Reserve Estate] G.N. No. 1144 of 16.12.1936 needs to be excised.

ii. The affected land under the existing Marudi Water Catchment areas (ungazetted) need to be excluded from the water catchment areas.

iii. It is also within the Long Panai (Gravity Feed) Water Catchment area as well as the Rural water intake point and proposed that this area be excluded from the application area.

Area C

i. The areas of land affected under the gazetted area applied for affected the existing Batu Belah Forest Reserve [Permanent Reserve Estate] G.N. No. 1144 of 16.12.1936 needs to be excised.

ii. The areas of land affected by the existing Marudi Water Catchment areas (ungazetted) needs to be excluded from the water catchment area.

iii. The majority of the land is held under a Provisional Lease issued to Formasa Abadi Sdn Bhd.

iv. To obtain a legal written agreement with the holders of the Licencce Planted Forest subject to concurrence of the Forest Department.

Area D

i. The areas of land affected under the gazetted area applied for affected the existing Batu Belah Forest Reserve [Permanent Reserve Estate] G.N. No. 1144 of 16.12.1936 needs to be excised.

ii. The areas of land affected by the existing Marudi Water Catchment areas (ungazetted) needs to be excluded from the water catchment area.

iii. The area of land affected by the existing Long Panai (Gravity Feed) Water Catchment (ungazetted) needs to be excluded from the water catchment area.

[21] The appellants further reasoned that the State Government of Sarawak had an overriding policy of discouraging mining of coal in areas where it can cause possible adverse environmental effects; that the applications were refused as the appellants wanted to avoid and prevent disruption to future water supplies and reserves for the Miri/Marudi population; and to avoid disruption of forest resources and flora and fauna where the overlapping forest areas were already *gazetted* and protected for conservation purposes.

DECISION OF THE HIGH COURT

[22] An extension of time was granted for the application for leave under O 53 r 3(7) of the Rules of Court 2012 to move the court for the various orders sought. Thereafter, the matter was heard on its merits. After a full hearing with affidavits exchanged, the application was allowed and prayers (i) and (iii) were granted. Upon hearing the pronouncement, the respondent moved the court to vary order (iii) to (ii). The learned judge was disinclined to change his orders; hence the appeal and the cross-appeal.

[23] In granting the respondent's application for certiorari and mandamus in the terms sought, the learned judge was of the view that the decisions were in breach of the rules of natural justice in that no reasons were given at the material time and that the respondent was not given a right of hearing before the first appellant refused its applications. The learned judge found that under s 44 of the Minerals Ordinance, the first appellant is empowered to approve or refuse to approve any application for mining lease and that the exercise of the power must be done within the provisions of the Ordinance.

[24] According to the learned judge, the law on judicial review had developed to the extent that though the Minerals Ordinance may not have provided for an opportunity to be heard and the provision of reasons for any decision reached, common law imposes a duty on the appellants to hear the respondent before any decision is made; and when a decision is reached, reasons to be forthcoming. More so when the respondent held a GPL and had invested substantial sums exploring and prospecting under the GPL. The learned judge was of the view that as a holder of a GPL, the respondent was 'just one step away from obtaining a mining lease. In fact s 32(2) and (3) expressly state that his right to be granted a mining lease would be subject to certain conditions listed thereunder. On the other hand, s 44(4) and (5) provide that the first respondent shall verify whether the applicant has complied with the requirements of the said Ordinance and is technically and financially sic qualify to develop and mine the area to which the application relates ... Considering all these facts in a proper perspective, it is now imperative that the first respondent should provide the reasons for its refusal to grant the mining lease to the applicant'. Since no such opportunity was afforded to the respondent; and no reasons were given for the decisions reached, the learned judge concluded that such failures triggered 'a reasonable inference that the discretion was not exercised in accordance with law'. The impugned decisions were thus invalid for procedural impropriety.

OUR DELIBERATIONS AND FINDINGS

[25] Before us, the appellants raised three principal issues:

A (a) common law cannot override statute, that is, the Minerals Ordinance 2004;

(b) there was no procedural impropriety and no illegality; and

(c) the reasons for refusal involved policy considerations.

B

[26] The cross-appeal by the respondent relates to the refusal of the learned judge to vary the terms of the order of mandamus granted, that instead of directing the appellants to reconsider or re-determine the respondent's applications for mining leases, that the appellants or any of them be compelled C to approve the grant of the mining leases sought.

[27] The submissions of the appellants may be summed up as thus.

D **[28]** Citing various decisions of the Federal Court and Court of Appeal, the appellants maintained that where the provisions of law are clear, the court should not attempt 'to modify and qualify' the provisions of law, 'particularly when there is no ambiguity'; that 'it is the court's duty to give effect to the provisions of the Constitution and statutory law; that 'no facet of the common E law of England can override our written law ... and it is not for the courts to question the policy considerations behind the statutory provisions. We must leave that to the wisdom of the Legislature' (see *Tun Dr Mahathir bin Mohamad & Ors v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2018] 3 MLJ 466; [2018] 4 CLJ 361; *Malaysia Airline System Bhd v Wan Sa'adi @ Syed Sa'adi bin* F *Wan Mustafa* [2015] 1 MLJ 757; [2015] 1 CLJ 295; *Abdul Salam bin Husin v Majlis Angkatan Tentera & Anor* [2011] 2 MLJ 573; and *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1).

G **[29]** In essence, it was not open to the learned judge to rule that common law imposes a duty on the first appellant to hear the respondent before making its decisions when there is no such requirement under the Minerals Ordinance 2004 (Cap 56) (Ordinance). To impose such a condition is in effect adding an extra condition or requirement into the Ordinance which is not there, and that H would amount to changing and qualifying the provisions of the Ordinance, a task that is not available to the courts. The appellants submitted that the Ordinance already has specific provisions on the steps to be taken whenever an application for a mining lease is received; and since these steps were observed in this appeal insofar as the four applications are concerned together with I observance of the rules of natural justice, there is no procedural impropriety as alleged. There also cannot be a failure to consider relevant facts when the appellants had in fact considered the recommendations of the various departments and relevant agencies before the decisions to refuse the approvals were made.

[30] On the matter of giving reasons for its decisions, the appellants similarly relied on a line of authorities from the Federal Court and the Court of Appeal including *Minister of Labour, Malaysia v Chan Meng Yuen & Another Appeal* [1992] 2 MLJ 337; *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor* [2018] 6 MLJ 670; *Ambiga a/p Sreenevasan v Director of Immigration, Sabah, Noor Alam Khan bin A Wahid Khan & Ors* [2018] 1 MLJ 633; to say that the courts cannot compel the giving of reasons where there is no duty to do so; that 'the common law duty to give reasons has not found favour in most commonwealth jurisdictions'; that consequently, 'no question of a failure to observe the principles of natural justice could arise' when no such right exists to begin with.

[31] Finally, it was submitted that there was a failure on the part of the learned judge to appreciate or take cognisance of the fact that the appellants' decisions involved policy considerations in the exercise of the discretion under s 44 of the Ordinance. The 'Courts do not possess the knowledge of policy considerations that underlie the decisions pursuant to the DG and/or the DG's evaluation', as per Federal Court in *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321. Hence, the application ought to have been dismissed.

[32] On the other hand, the respondent insisted that the order of certiorari and mandamus ought to be granted because:

(a) it is the holder of a GPL under s 22 of the Ordinance;

(b) it has expended substantial effort and money which led to the discovery of substantial mineable coal reserves within the GPL area;

(c) it is merely one step away from obtaining the mining lease under s 44;

(d) the appellants had twice rejected its applications without giving an opportunity to be heard and without stating any reason;

(e) reasons were only given in the affidavits filed in opposition in the judicial review proceedings; and

(f) the director of Lands and Surveys, Sarawak had in fact recommended that the applications be approved subject to conditions.

[33] Learned counsel for the respondent submitted that even if legislation was silent on its rights to be heard, common law will supply the omission and the respondent has a right to be heard before a decision is made. The respondent, too, relied on a line of authorities for this proposition — see *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152; [1975] 1 LNS 72; *Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor* [2016] 2 MLJ 495; [2016] 5 CLJ 250; *Mohamad Hassan bin Zakaria v*

Universiti Teknologi Malaysia [2017] 6 MLJ 586; [2017] 10 CLJ 36; *Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor v Ang Ming Lee & Ors and other appeals* [2018] 4 MLJ 545; [2018] 9 CLJ 640.

[34] Tackling head on nevertheless with the reasons given by the appellants, that of the state government's overriding policy to discourage the mining of coal in areas where it can cause possible adverse environmental effects, the respondent submitted that:

(a) the reason was plainly unreasonable and unfair because of the grant of GPL in the first place over the Batu Belah Forest Reserve and the provisional lease;

(b) the respondent's proposed coal mining project had already received the approval of the Natural Resources and Environment Board Sarawak in which case, the allegation that the proposed coal mining project can cause possible adverse environmental effects is only a bare allegation with no report, particulars or evidence to substantiate the concerns; and

(c) the director of Lands of Survey had recommended under s 44(1) of the Ordinance that the lands affected be excised from the Batu Belah Forest under s 32(3) of the Ordinance, and the affected land under the provisional lease be acquired by the respondent pursuant to s 32(2) of the Ordinance.

[35] The respondent maintained that it, too, had followed the procedures laid down in the Ordinance; that it was the Minister himself who had made the decision to issue the GPL to the respondent to prospect for coal; that the issuance of the GPL over a specific area was determined by the government itself. The respondent submitted that the issuance of the GPL is a representation to the respondent that the appellants allow prospecting and coal mining to take place in the area. The GPL of two years was never revoked and with the huge sums of money invested and the discovery of substantial mineable coal reserves within the area; it was not open to the appellants to change its decision or 'policy' overnight to say no coal mining should take place within the area in the GPL. The reasons relied on by the appellants are thus plainly unreasonable and unfair.

[36] The respondent further submitted that the decision of 21 August 2017 was not made in accordance with s 44(1) of the Ordinance in that there was no evidence that the first appellant had transmitted the respondent's application over the smaller area to the director of Lands and Surveys for comments and recommendations as required under s 44(1). This is said to render the decision of 21 August 2017 'fundamentally flawed and incurably bad'.

[37] The supervisory powers of the court are discrete additional powers

conferred by s 25(2) of the Courts of Judicature Act 1964 (Act 91). Item 1 of the Schedule to Act 91 provides that the courts have:

> 1. Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, *quo warranto* and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[38] Such supervisory powers must be exercised judiciously and responsibly. Although these powers may be resorted to for any purpose, more frequently than not, these powers are engaged when parties are seeking to enforce any of the rights or fundamental liberties as enshrined in Part II of the Federal Constitution. It would be reasonable to say that these powers are also invoked when the original and appellate powers of the courts are either inadequate or are not able to address the specific complaints in issue. In the instant appeal, the respondent's complaints pertain to infringement of its economic and financial interests as opposed to personal rights or any of the rights found in Part II of the Federal Constitution. While the supervisory powers of the court are open too to corporate soles, we would nevertheless venture to say, that the availability of this jurisdiction is very much dependent on the facts. This is evident from the decision of the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1; [1999] 5 CLJ 65; also Court of Appeal in *Mohamad Hassan Zakaria v Universiti Teknologi Malaysia*. Be that as it may and so as to better understand the respective arguments of the parties, first, there must be some appreciation of the operation of the Ordinance.

[39] This is how prospecting licences and mining leases are granted under the Minerals Ordinance 2004 (Cap 56), an Ordinance enacted to make better provisions in the law relating to minerals other than mineral oil and the prospecting and mining thereof and for incidental matters.

[40] Pursuant to ss 5, 6 and 7 of the Ordinance, the administration of the Ordinance is left to the director of Lands and Surveys ('the director'), the third appellant and such other persons as may be appointed by the Minister charged with the responsibility for land and minerals; in this case, the fourth appellant; and an entity known as the State Minerals Authority ('the authority'), a body established under s 7 with specific functions and powers prescribed in s 8. The authority comprises:

(i) the Minister, as Chairman;

(ii) a Deputy Chairman;

(iii) the State Financial Secretary;

A (iv) the Permanent Secretary to the Ministry responsible for land and minerals;

(v) the director of Lands and Surveys; and

(vi) not less than three and not more than five other ordinary members.

B

[41] Amongst the powers of the authority, the first appellant in this appeal, is the power to approve general and exclusive prospecting licences under s 22, and mining leases under s 44. The Ordinance contains a fairly elaborate set of procedure on how such licences and leases may be obtained. Understandably, C there must be applications by interested persons.

[42] In this appeal, the respondent held a GPL. The respondent applied for and was granted the GPL under s 25. A GPL, as opposed to an exclusive prospecting licence, authorises the respondent to prospect for minerals within D the area specified in the licence but it does not preclude any other licence holder or party from prospecting for other minerals in the same area issued to the respondent under its GPL. An exclusive prospecting licence (EPL), by contrast, authorises sole and exclusive right to prospect for any minerals specified in the E licence within the area stated in the licence — see s 25(2).

[43] Now, a holder of a prospecting licence may apply for one or more mining lease in respect of any part of the land which is subject to the licence — see s 32. Depending on the status of the land in question, the holder will have F to comply with different statutory conditions before any mining lease may be granted:

(a) where the land concerned is wholly or partly alienated land, s 32(2) specifically requires the holder to be the registered owner of the land; or G that the holder will acquire and pay costs of such acquisition; and in both scenarios, the authority must recommend approval of the application;

(b) where the land concerned is wholly or partly of reserved land or reserved forest area, the right of the holder is subject to the reservation being revoked and the recommendation of approval by the authority; and H

(c) where the land concerned is wholly or partly of occupied land, the right of the holder is subject to the valid termination of the right of occupation, and the recommendation of approval by the authority.

I **[44]** How a mining lease may be secured is set out in s 44:

> 44(1) An application for a mining lease shall be made to the Authority in a form prescribed by the Authority, and upon receipt thereof the Secretary shall transmit the same to the director, for his comments and recommendations.

(2) An application for a mining lease shall include a pre-feasibility study which shall include —

(a) a general description of the proposed mining scheme;

(b) the expected commencement date of mineral production (to be stated as the number of months from the date of issuance of the mining lease);

(c) a schedule of estimated annual raw ore production for the term of the mining lease;

(d) such information as may be prescribed; and

(e) such other information as the Authority may reasonably require for the discharge of its functions in relation to the application.

(3) Upon receipt of the comments and recommendations of the director under subsection (1), the Authority shall consider the application.

(4) In considering an application for a mining lease, the Authority shall verify that the applicant —

(a) has complied with the requirements of this Ordinance; and

(b) is technically and financially qualified to develop and mine the area to which the application relates.

(5) The Authority shall subject to section 50 either —

(a) approve the application:

(i) confirming that the application has complied with the requirements of this Ordinance; and

(ii) specifying the terms and conditions subject to which the lease is to be granted; or

(b) refuse to approve the application.

(6) The Secretary shall notify the applicant and the director in writing of its decision under subsection (5).

(7) ...

(8) ...

[45] It starts with an application using a prescribed form which is accompanied by a prefeasibility study covering the overall details mentioned in s 44(2) such as the proposed mining scheme, relevant dates of commencement of production, and estimated annual volume or raw ore production. The application is made to the authority; and the secretary to the authority is obliged to transmit all applications received to the director for his comments and recommendations.

[46] The authority is obliged under s 44(3) and (4) to consider all

A applications received together with the recommendations and comments of the director; in particular, the authority is required to verify whether applicants have complied with the requirements of the Ordinance and whether the applicants are technically and financially qualified to develop and mine the area concerned. To a large extent, this verification exercise duplicates the procedure
B for prospecting licences under s 22.

[47] Subject to s 50 which deals with the size of the area that may be granted a mining lease, the authority may either approve or refuse to approve an
C application. Where the authority is approving an application, it is obliged to confirm that the application has complied with the requirements of the Ordinance and specify the terms and conditions to which the grant of the mining lease is subject to. Where the application is refused, it is silent as to what the authority is then required to do or state. The decision of the authority in
D either case has to be notified to the applicant and the director in writing by the Secretary.

[48] These fairly comprehensive provisions are well laid out in the Ordinance for all to see and comply, whether it be the respondent or the
E appellants. These provisions guide applicants and decision makers alike; and thus it would be extremely difficult to read into such legislation terms or conditions which are not there. These provisions also indicate that at all times, there must be recommendations of approval by the authority before a mining lease is granted.

F

[49] The whole business of prospecting for and then later mining of, minerals is a business with substantial financial and technical considerations. Uppermost must be the policy considerations that necessarily encompass environmental and sustainability issues. This is evident from the terms of s 54
G which imposes fairly stringent statutory conditions on every mining lease granted. These statutory conditions concern matters such as keeping true and sufficient books of account, ensuring prescribed environmental standards are observed, complying with approved environmental impact assessments.

H **[50]** It is, however, clear that there are no requirements, whether in s 44 as described above, or elsewhere in the Ordinance, to hear the respondent before a decision is taken or for reasons to be given in any decision made. At paras 14–17, whilst acknowledging that s 44(5) empowered the authority to approve or refuse to approve an application for a mining lease, the learned
I judge had reasoned that 'notwithstanding the fact that the Ordinance does not provide that the applicant should be given an opportunity to be heard, it is now trite that common law imposes a duty on the first respondent to hear the applicant before making the decision. This is especially so when sub-s 4 makes it mandatory for the authority to verify whether the applicant has complied

with the requirement of the Ordinance and is technically and financially qualified to develop and mine the area for which the applicant relate'. A

[51] It would not be overstating the obvious to say that the respondent's interests are in the coal deposits in the relevant areas applied for. Although the learned judge was of the view that the respondent's GPL meant that it was 'one step away' from obtaining the mining lease under s 44 because '... s 32(2) and (3) expressly state that his right to be granted a mining lease would be subject to certain conditions listed thereunder'; that 'right' must be read subject to the fact that the property in these coal deposits remained those of the State Government's — see s 125. Unless the contrary is proven, s 125 deems all minerals to be the property of the state government. B C

[52] Consequently, we would rather understand the 'right' referred to in s 32(2) and (3) as a qualified right to apply for and be granted mining leases under s 44 in respect of lands which are alienated, reserved or occupied; or just state land. It is qualified as it is not guaranteed. This may be discerned from s 44 itself where applications may be allowed or refused; and even where allowed, it would be subject to terms and conditions. It is also qualified in that someone else can apply for a mining lease over the same state land where the respondent holds its GPL. However, the respondent's written consent is required — see s 43(1) and (2). D E

[53] All these provisions indicate that the respondent, a holder of a GPL, is not necessarily assured of being granted a mining lease. Its interests and presence are acknowledged but that does not amount to a lien or a right to a mining lease, without more. As we can see from the terms of s 44, even where a lease is approved, there are still mandatory statutory terms that may be imposed aside from any other terms and conditions as specified by the authority, which may well be unsuitable or unfavourable to the respondent; and the respondent may well decide against proceeding with the lease in those circumstances. Hence, it is inaccurate to describe a holder of a GPL to be 'one step away from obtaining a mining lease'. F G

[54] The provisions of s 44 further support this view. The grant of a mining lease is a matter of discretion statutorily vested in the authority. There are however, provisions on how that discretion is to be exercised. Under s 44(4), when considering any application for a mining lease, the authority is mandatorily required to verify that the applicant has complied with the requirements of the Ordinance and is technically and financially qualified to develop and mine the relevant area. It also has to take into consideration the comments and recommendations of the director. These provisions are, in our opinion, adequate safeguards sufficient for ensuring that decisions reached are proper, well-informed and absent of arbitrariness. The non-provision of a right H I

to hear the applicant, whether orally or in any form before the impugned decisions were taken, cannot and does not render these decisions invalid.

[55] Of course, if the authority chooses to hear the applicant before making its decision, that is a matter of good practice and better transparency. The courts have expressed opinions to this effect — see *Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor*. But, to hold the decisions in this appeal invalid due to a lack of opportunity given to the respondent to convince the appellants would be to go entirely beyond the terms of s 44. Such a reading would require the court to supplement, modify and/or qualify the clear explicit provisions of the Ordinance, a task that is not the duty of the court — see *Abdul Salam bin Husin v Majlis Angkatan Tentera & Anor* [2011] 2 MLJ 573.

[56] In any event, we do not agree that the *audi alteram partem* rule calls for the interpretation and construction as given by the learned judge. We find quite on the contrary, the procedure in s 44 to be quite elaborate and comprehensive, enough to ensure the more important element that lies at the heart of natural justice, that is, the right to present one's case, is observed. And, it cannot be denied that the terms of s 44(3) and (4) serve precisely that purpose. The Ordinance has seen fit how applications for mining leases are to be processed, and the court cannot second guess or re-write that process; nor do we have any intention to do so in this appeal.

[57] In *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203, a case concerning a challenge of dismissal of a police officer being violative of arts 132, 135(2), 140(1) and 150 of the Federal Constitution where there is a specific requirement for a reasonable opportunity to be heard before dismissal, the Privy Council, inter alia, held that the meaning of the term 'heard', 'must depend on the context in which it is used'. The Privy Council refused to interpret the term in art 135(2) of the Federal Constitution to include a right to an oral hearing. We are not prepared to do the same in the context of s 44 of the Ordinance for this appeal.

[58] On the matter of lack of reasons, the learned judge took the position that 'even if it can be argued that the first respondent (the first appellant) has a valid ground in rejecting the application, the fact remain that those reasons were not conveyed to the applicant before the letter was issued. As such, the decision was flawed with procedural impropriety'. The learned judge (at para 24) concluded 'the absence of any reasons in the letter dated 16 May 2017 and 21 August 2017 would trigger a reasonable inference that the first respondent had not exercised its discretion in accordance with the law'.

[59] We note that the learned judge was very much persuaded by the fact

that the director had made certain recommendations to the Permanent Secretary to the Ministry of Urban Development and Natural Resources, recommendations that were supportive of the respondent as the respondent had already expended over RM6m prospecting and exploring under the GPL. The director recommended that a provisional approval be given subject to the respondent being 'required to prepare and submit a Pre-Feasibility Report to the authority for consideration and approval to determine the term of the mining lease'; and that the areas of land affected under the Batu Belah Forest Reserve (Permanent Forest Estate) be excised from the *gazette* as required under s 32(3).

[60] Taking cognisance of the fact that the GPL encompassed reserved land, the learned judge had further reasoned that the respondent's rights under s 32 were thereby affected. Section 32(2) and (3) envisage mining leases may be granted over alienated or reserved land; and since there were recommendations from the director of Lands and Surveys Department that provisional approvals of the mining leases be given subject to the respondent preparing and submitting a prefeasibility report to the authority for consideration and approval to determine the term of the mining leases, as well as a recommendation that affected reserved lands be excised from the relevant *gazette*, the appellants must be fair to the respondent and must give the respondent 'the opportunity to convince the first Respondent that s 32(2) and/or (3) should be invoked by the first Respondent'.

[61] We are prepared to agree with the learned judge that whilst the Ordinance may be silent on the requirement of giving reasons, the factual matrix and the scheme of the Ordinance are valid basis for the proposition that at the very least, reasons ought to have been forthcoming to the respondent at some point or other. It certainly makes for transparency and better administration of the Ordinance in particular and for good governance generally. But, that is still far from saying that 'it would appear that the duty to give reasons has now become part of lawful decision-making process,' that there exists a common law right to be given reasons for any decision made and that there is a common law right of an opportunity to be heard before that decision is made; and that any failure to comply with either requirement renders decisions reached invalid and ripe for the court's exercise of its supervisory powers.

[62] With respect to His Lordship, we do not find the reasoning valid. In *Mohamad Hassan Zakaria v Universiti Teknologi Malaysia* where the complaint was also, amongst others, about not giving reasons at the time of decision, the Court of Appeal had examined the Federal Court's decision in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1, paras 36–41.

[63] In *Majlis Perbandaran Pulau Pinang*, the Federal Court had considered:

(a) Lord Denning's remarks in *Breen v Amalgamated Engineering Union & Ors* [1971] 2 QB 175 that where a person 'has some right or interest, or legitimate expectation of which it would not be fair to deprive him without a hearing or reasons given, then these should be afforded him accordingly, as the case may demand';

(b) that this principle 'has also been invoked in the case of *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 where it was ruled that a reasoned decision can be an additional constituent of the concept of fairness';

(c) that such requirement of fairness 'depends upon the context of the decision';

(d) Lord Mustill's views in the House of Lords' decision in *Doody v Secretary of State for the Home Department* [1990] All ER 123, that a duty to give reasons may be implied in appropriate circumstances:

> I accept without hesitation ... that the law does not at present recognize a general duty to give reasons for an administrative decision. Nevertheless it is equally beyond question that such a duty may in appropriate circumstances be implied ...

(e) Michael Beloff QC's views on *Doody* as expressed to the Law Society of Singapore and published in the *Law Gazette of the Law Society of Singapore* of February 1999 that:

> Although a right to reasons has not yet been recognized as a pervasive aspect of fair procedure, it is becoming less an exception, than a rule subject to exceptions, not least because reasons enable the Court to exercise their supervisory role more effectively when they can detect whether a decision is not flawed by error. *Ex p Doody* [1994] 1 AC 531; *R v UFC; ex p Dental Institute* [1999] 1 WLR 242.

(f) that in *Dr Stefan v The General Medical Council* [1999] 1 WLR 1293, although there were no express statutory obligation to state reasons and neither could it be implied such an obligation, the Privy Council found that there was power to give reasons, as:

> ... giving reasons can be beneficial and assist justice: (1) in a complex case to enable the doctor to understand the Committee's reasons for finding against him; (2) where guidance can usefully be provided to the profession, especially in difficult fields of practice such as the treatment of drug addicts; and (3) because a reasoned finding can improve and strengthen the appeal process.

(g) that on 'the alternative approach — that of the Common Law' of a general duty to give reasons, the Privy Council acknowledged that whilst there were obvious advantages for such a requirement such as a

strengthening the decision-making process, increasing public confidence in that process and enabling affected parties to immediately know the strengths and weaknesses of their respective cases, and to facilitate appeal where that course is appropriate, that there is a 'trend … towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current development towards an increased openness in matters of government and administration';

(h) that the Privy Council nevertheless opined that the trend is proceeding on a case by case basis (*R v Royal Borough of Kensington and Chelsea; ex p Grillo* [1996] 28 HLR 94); and 'has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers'; … that:

> there are also dangers and disadvantages in a universal requirement for reasons. It may impose an undesirable legalism into areas where a high degree of informality is appropriate and add to delay and expense.

[64] The Federal Court concluded at p 64:

> We endorse the principles enunciated by the Privy Council in *Dr Stefan* and say that *in the exceptional circumstances of this case and having regard to the trend towards increased openness in matters of Government and administration, as a matter of fairness, reasons should have been given by the Council as to why it was imposing the disputed condition and thus resiling from the original approval of planning permission which was free from any pricing condition*. In so holding, we should like to place special stress on the Council's earlier statement, when responding to a plea by members of the Society regarding pricing, that pricing was an internal matter and did not concern it. To put it mildly, the circumstances here were such as to cry out for an explanation from the Council as to its departure from its earlier stance, yet none was vouchsafed to the Society until after proceedings had been commenced in Court. That belated explanation, as we have already indicated, left much to be desired.

[65] Following thus the Federal Court in *Majlis Perbandaran Pulau Pinang* and the Privy Council decision in *Dr Stefan*, a reasoned decision is really an additional constituent of the concept of fairness as opposed to being in itself and on its own, without more, a common law duty to provide reasons. There is no universal common law duty to give reasons. It is a matter of fairness and the trend towards increased openness proceeds on a case by case basis. In a case where there are no express or implied requirement to provide reasons, and it cannot be inferred such a power too, then it is whether there are exceptional circumstances for this requirement; whether as was the case in *Majlis Perbandaran Pulau Pinang*, a 'cry out for an explanation' as was so in *Mohamad Hassan Zakaria*.

[66] The learned judge took it to be the law that there is now a common law duty to give reasons when as we can see there is none. The invocation of that

duty is through a careful process and only in exceptional circumstances. It is our view that the appellants' failure to state reasons at the material time is not fatal. The conditions in *Dr Stefan* as endorsed in *Majlis Perbandaran Pulau Pinang* are not presented in this appeal. Section 44 is explicit and clear in its requirements and we also do not find any room for any inference of a duty to give reasons for any decision reached. We further find no reason or room to infer such a power the breach of which renders the decisions reached invalid.

[67] As opined earlier, the provisions of the Ordinance and in particular the process in s 44 are fairly comprehensive and adequate to deal with concerns such as needing to strengthen the decision-making process, increase public confidence and enable affected parties to know the strengths and weaknesses of their respective cases, and to facilitate any appeal. The appellants may choose to do more as a matter of good administration and greater transparency, but the appellants have complied with all the requirements of s 44 and cannot be faulted. In any event, there is no appeal process in the Ordinance for us to infer the presence of a power to give reasons, where the reasons for a refusal of approval would be beneficial to assist in the preparation of the appeal.

[68] The appellants did disclose their reasons for the refusal, albeit in the affidavits filed in opposition to the application for judicial review and in the further affidavit, both of Dr Wan Lizozwan bin Wan Omar, the permanent secretary to the authority and who communicated the first appellant's refusal to the respondent. Dr Wan deposed on behalf of all the appellants.

[69] At para 6 of the first affidavit, and at paras 10–11 of his further affidavits, Dr Wan Lizozman bin Wan Omar disclosed that the refusal to approve the applications were based on the following grounds:

(a) the area applied affects the existing *gazetted*; Batu Belah Forest Reserve (Permanent Reserve Estate) GN No 1144 of 16 December 1936;

(b) the area applied affects the existing Marudi Water Catchment areas;

(c) the area applied for is within the Long Panai (Gravity Feed) Water Catchment area as well as the Rural water intake point Long Panai (Gravity Feed) Water Catchment area as well as the Rural water intake point;

(d) part of the land is held under a provisional lease; and

(e) based on the above, it is the overriding state government's policy in discouraging the mining of coal in areas where it can cause possible adverse environment effects.

[70] The comments of the Land and Survey Department as contained in an official memorandum were also disclosed; and the same have already been set

out in the earlier part of this judgment.

[71] The appellants have thus explained that the refusal was because the subject areas involved forest and water catchment reserves; and that there were 'overriding State Government policy in discouraging the mining of coal in areas where it can cause adverse environment effects. According to Dr Wan, even by excluding the water catchment areas, the areas applied will still overlap the existing gazetted Batu Belah Forest Reserve (GN No 114 of 16 December 1936) and existing provisional lease of lot APOH Land District issued to Formasi Abadi Sdn Bhd'. At para 6.6 (p 98 of the record of appeal), Dr Wan Lizozwan said:

> The main reason for the rejection of the applicant's application for mining lease are to avoid and prevent disruption to future water supplies and reserves for the Miri/Marudi population as well as to avoid destruction of forest resources and flora and fauna, where the overlapping forest areas are already gazetted and protected for conservation purposes.

[72] The learned judge did not address any of these reasons at all; taking the position that because no reasons were given at the time of the issuance of the impugned letters, a reasonable inference that the first appellant had not exercised discretion in accordance with the law, was triggered. This understanding and application of the law, too, is incorrect. Although the reasons may not have been given at the material time of the letters, the fact remains that the reasons were made known at the time of consideration by His Lordship. Once placed before the court, we are duty bound to examine and consider those reasons with a view to ascertaining if the allegations of breaches of the rules of natural justice have been made out; that the decisions reached were devoid of reason and invalid under the *Wednesbury* principles and discretion must be exercised in favour of quashing those decisions.

[73] Unfortunately, save for a passing remark that he would 'take judicial notice that mining activities in any part of the world may have negative impact on the environment', there was no examination of the grounds for refusal. While acknowledging that the court did not have the 'expertise on technical issues connected with the applications such as the present case', that the authority 'is duty bound to consider various issues including the technical aspect of the operation'; the learned judge failed to evaluate whether the reasons disclosed by the authority and the other appellants were cogent, reasonable, rational and valid.

[74] The appellants had revealed that the refusal was because the areas over which the mining leases were sought for were state lands reserved as permanent forests since 1936, that existing water catchment areas of Marudi and Long Panai were affected; that the rural water intake point of Long Panai was also

affected; that part of the land was already under a provisional lease. Although the *gazetted* forest reserves may be revoked, as recommended, the appellants were not prepared to do so as it wanted to avoid the destruction of forest resources, flora and fauna. There were also the water catchment areas that the appellants were also not prepared to compromise. The appellants wanted to maintain these water catchment areas and water intake points in order to avoid and prevent disruption to future water supplies and reserves for the population of Miri and Marudi.

[75] We do not see any irrationality or unreasonableness in those reasons, or that these grounds are not available to the appellants to hold. We find, on the contrary, these are responsible and valid grounds that the appellants are entitled to rely on. These are not grounds requiring technical expertise as to their operation, as claimed by His Lordship. These are grounds which are reflective of a responsible authority and we have no reason to question their policy considerations. These reasons are best left to the appellants who have charge of the subject matter of minerals in the state as prescribed by the Ordinance.

[76] More particularly, we must add that the particular facts and circumstances in this appeal reveal that the respondent was actually well aware, at all times, of those very same reasons for the appellants' decisions dated 16 May 2017 and 21 August 2017.

[77] Although no reasons were expressed in the letter dated 16 May 2017 captioned 'Makluman awal keputusan permohonan pajakan melombong (mining lease) pursuant to s 44(1) of the Minerals Ordinance 2004 for Areas A, B, C and D, Tutoh, Miri'; and despite there being no appeals mechanism, the respondent set in motion no less than three appeals seeking a 'review/reconsideration of the applications for mining lease and the GPL renewal'. The first was vide letter dated 13 June 2017, the second letter was dated 24 July 2017 whilst the final letter was dated 5 September 2017. All the letters of appeal were sent to the Chief Minister cum Minister of Resource Planning and Environment (now Minister of Urban Development and Natural Resources).

[78] This was the first 'appeal' dated 13 June 2017:

> RE: APPEAL FOR APPLICATION OF MINING LEASES AND GPL RENEWAL UNDER GENERAL PROSPECTING LICENCE (GPL) No.: 01/2014
>
> We refer to your letter dated 16th May 2017 which we received on 3first May 2017 with regards to the decline of the applications for four mining leases under General Prospecting Licence (GPL) No.: 01/2014 and the renewal of the GPL itself for the remaining unexplored of 6597 hectares. We fully respect your decision but we

humbly appeal to your honourable office to kingly to review and reconsider the above applications.

First and foremost we are grateful to the State Government of the day, in particular the Chief Minister good office for the granting of the General Prospecting Licence to GORSB on 23rd May 2014. Under the approved GPL we have undertaken extensive explorations, surveys, geological tests and finally feasibility studies, incorporating Environmental Impact Assessment (EIA) with mandatory sic rehabitations.

As a matter of fact, to obtain the mining leases is the ultimate given purpose of the approved GPL under the Mining Ordinance after we have undertaken the related activities to fulfill the relevant preceding sections of the Ordinance.

Forest Reserves

The General Prospecting Licence was approved over the Forest Reserve with the awareness of the approving authority as per approval letter dated 8th May 2014 with map, Plan (A). It clearly indicates the major portion of the approved GPL is over a Forest Reserve.

These Forest Reserved areas have been fully harvested by licensed Timber companies as approved by Forestry Department. These areas are now under trees replanting programme.

Under the EIA specific terms and conditions under Issue 14, after mining we have to undertake to replant and sic rehabitate the mined areas. After sic rehabitation is completed we will be handing back over to the Forestry Department.

Water Catchment Areas

We understand the proposed mining leases encompass some water catchment areas and we are fully agreeable that the boundaries of these proposed mining leases be realigned to exclude such water catchment areas.

Environment Impact Assessment

The EIA Report was approved via approval letter under reference ... dated 15th December 2015 and the approval EIA Certificate was subsequently issued on 11th December 2015.

Financial Commitments

To date we have committed and sic expensed more than MYR8 millions to carry out the above mentioned explorations and sturdies to fulfill the statutory conditions of the GPL. The shareholders have to inject in their own monies into the company for the last two years as the company is still in the pre operating status with no income.

Royalty to State Government

On the positive notes we are delighted with the fruitful outcome of the exploratory drilling and tests which indicate good economical mineable reserves of good quality coal. These estimated mineable reserves for the proposed four mining leases is about 116,400,000 (One Hundred Sixteen million and Five Hundred Thousand) million tonnes. Based on the existing state government royalty rates this will contribute

around Malaysian Ringgit 932,000,000 (Nine Hundred and Thirty Two millions) to the State Government.

Coal Mining Consultant

Our coal mining consultant is Britmindo Mining Services Singapore Pte Ltd. This Britmindo Group is a renowned and experienced international coal mining consultant sic which cliental include big global banks and multinational mining companies. We have committed to them to carry out the whole mining project.

Mining Contractor

Our mining contractor Franky Resources Sdn Bhd did the drilling and exploration under the supervision of Britmindo Mining Services Singapore Pte Ltd. This Franky Group has business activities in mining, engineering and construction and is currently providing mining services to Sarawak Coal Resources Sdn Bhd.

Enclosed is the copy of the General Prospecting Licence (GPL) No.: 01/2014 and EIA Report Approval Certificate ... for your kind perusal.

We sincerely hope and anticipate a favourable reply from your honourable office. Last but not least, we would like to thank you for your tie and support in deliberating on our appeal letter.

Wishing you the best of health YAB. Thank you

Yours faithfully

For Gegah Optima Resources Sdn Bhd

Chairman

[79] This was the second letter of appeal dated 24 July 2017:

RE: APPEAL FOR APPLICATION OF MINING LEASES AND GPL RENEWAL UNDER GENERAL PROSPECTING LICENCE (GPL) No.: 01/2014

Further to our letter ref. ... dated 13th June 2017 and for the reasons mentioned therein, we would be very pleased if the Ministry's letter ref. ... dated 16th May 2017 declining approval of our application for Mining Leases over the areas which have been issued with General Prospecting Licence in 2014, be reviewed and replaced with 'diluluskan dengan syarat' as follows:

1. Areas within the Rural Water Intake Point in the Water Catchment Areas be excluded from the Mining Leases. In the results, 'Area A' (576 hectares) is dropped, and 'Area D' be reduced in scale to less than 1976 hectares.

2. Mining Leases for 'Area B' and 'Area C' be maintained as we have been advised that mining activities over areas in the Forest Reserve is permitted under the State Minerals Ordinance 2014 subject to rehabilitation works being carried out in accordance with the terms and conditions of its approval and EIA requirements, the Forest Ordinance 2015 also allows for such mining to be done subject to the director's Permission. The State Minerals management authority is well represented to give due consideration to such mining application which benefits the State

economically whilst giving due protection to its environment.

We give out utmost assurance, Sir, that we are a responsible company befitting the objectives behind the promulgation of the State Minerals Ordinance 2014.

Thank you again for giving us the due consideration.

(GPL) No.: 01/2014 and the renewal of the GPL itself for the remaining

Yours faithfully

For Gegah Optima Resources Sdn Bhd

Chairman

[80] This was the third letter of appeal dated 5 September 2017:

RE: APPEAL FOR ISSUANCE OF MINING LEASES VIDE GPL No.: 01/2014

We respectfully refer to the abovementioned matter.

2. As YAB Datuk Amar would have known from records, we have four (4) applications for Mining Leases by letter references as follows:

1. GORSB/TTML/15/1124 dated 24th November, 2015
2. GORSB/TTML/16/0505(550H) dated 5th May, 2016
3. GORSB/TTML/16/0505(2000H) dated 5th May, 2016
4. GORSB/TTML/16/0505(1800H) dated 5th May, 2016

3. Our recent appeal by letter reference ... dated 24th July, 2017 indicated our intention to abandon 'Area A' totally, and with a reduction in area for 'Area D' since the areas fall within the Water Catchment Area. Although we believe that development of the affected areas can be permitted through proper planning, regulation and monitoring, it is better still to leave out the areas in the long run.

4. Nevertheless, we plead that our 'Area B', 'Area C' and 'Area D' (as reduced) be issued with Mining Leases as all legal requirements under the relevant State Laws have been complied with. Besides, a huge amount of money had been spent to operationalize the GPL requirements. The issuance of Mining Leases will enable our company to operate in accordance with the requirements of the EIA and of the industry, which will ultimately benefit all parties, including the royalty payable to the Government. The available coal needs to be excavated for its economic returns and its development be better regulated in tandem with the objectives of the Minerals Ordinance, 2004. The fact that the said areas fall within the Forest Reserves do not prevent such an important mineral from being mined just as felling of its timber thereon by issuance of timber licences under the Forests Ordinance, 2014. All the more important is that GPL had been sic in issued in 2014, and for the mining lease to be issued since all legal requirements for the issuance thereof have been fulfilled.

We await positive reply from YAB Datuk Amar and thanking YAB Datuk Amar for the kind consideration on the matter.

A Yours faithfully

Chairman

[81] In the first letter of appeal, the respondent had readily admitted that
B they 'understand the proposed mining leases encompassed some water catchment areas' and that it was 'fully agreeable that the boundaries of these proposed mining leases be realigned to exclude such water catchment areas'. The respondent further alluded to the fact that its GPL was approved over a forest reserve and that the forest reserve areas have been fully harvested by
C licenced timber companies as approved by forestry department, that these areas are now under tree replanting program but that as per EIA specific terms and conditions, it undertakes to replant and rehabilitate the mined areas after mining and to hand back the area to the forestry department upon completion of rehabilitation.

D

[82] In the second letter of appeal, the respondent had proposed that the letter of rejection dated 16 May 2017 be replaced with 'diluluskan dengan syarat'. Essentially, the respondent proposed this time, that Area A of 576
E hectares be excluded and that Area D be reduced to less than 1976 hectares. Both of these proposals were to overcome the concerns over the water catchment areas. As for Areas B and C, the respondent wanted these to be maintained contending that mining activities over forest areas and alienated land subject to rehabilitation works, as per EIA requirements, are permitted
F under the Ordinance.

[83] In its third letter of appeal, the respondent reiterated its earlier positions but this time, mentioned that it had invested substantial monies in operationalising the GPL requirements and that the state would benefit from
G royalty collected from the mining activities.

[84] Indeed, all these letters written by the respondent after 16 May 2017, the first of the two impugned decisions, more than indicating that the respondent was quite aware of the impediments and the reasons behind the
H refusal of its applications. It is clear to us that the reasons for the first appellant's refusal are in fact the very same reasons or matters that the respondent itself had raised in its letters of appeal/review/reconsideration, addressing and offering alternative solutions so as to procure a positive reply from the appellants.

I **[85]** The respondent was fully aware of the underlying conditions of the areas over which mining leases were sought. This information and data were already known or ought to have been within their knowledge when they procured the GPL. In any case, the forest reserve and water catchment areas are gazetted areas, and knowledge is presumed.

[86] The learned judge did not address this critical factor, taking a literalistic approach to reproach the appellants for not having given their reasons at the material times the decisions were made, because the letters themselves did not set out the reasons. Had the learned judge examined the affidavits filed, as he was required to, His Lordship would have seen that the respondent's complaints were more of form than substance; that the appellants had perfectly valid reasons for their decisions and those reasons were known to the respondent at all material times. No rule of natural justice had been breached, there was no prejudice suffered; and the respondent's complaints were in fact unreasonable and unwarranted. This is quite unlike the case in *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 1 WLR 525; [1989] 2 All ER 609, where the House of Lords through Lord Keith of Kinkel had said at p 529:

> The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision.

[87] Having examined all those reasons ourselves, we are also convinced that they are not only genuine but cogent, sound and valid. These reasons which are driven by policy considerations are not quite suitable for the court to scrutinise and pass judgment, as explained by the Federal Court in *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321. These reasons, in any event, are by no means irrational or unreasonable in the *Wednesbury* sense. They cannot be said to be in defiance of logic or irrational, unjust or invalid. On the contrary, the learned judge's remarks that the respondent was 'one step away' from the mining lease seems to suggest that the grant of a mining lease to the respondent was a done deal or *fait accompli* the moment the GPL was issued to the respondent.

[88] We find that argument bereft of sound reasoning or principle. Had that been the reading and intent of the Ordinance, there would have been clear provisions to that effect; and there would have been no need for the process in s 44. In fact, a reading of s 44 indicates it to be a standalone provision in that an applicant does not necessarily have to be in possession of a prospecting licence before applying for a mining lease. As alluded to earlier, another applicant other than a holder of a prospective licence may apply for a mining lease but in that scenario, the consent of the holder of the licence is required — see s 43(2).

[89] With respect to the learned judge, the Ordinance does not give any preference to any applicant. It certainly does not take into account the fact that

the applicant may have already expended substantial sums of money or resources in the exploration and prospecting work under the licence. We further observe the absence of a mandatory prefeasibility study in all four applications required under s 44(2). The director recommended that such study be prepared and pending such report, a provisional approval be granted.

[90] In this regard, on the recommendation and role of the third appellant, the director, this is our view. While he may well have recommended the approval of the mining leases on conditions that the relevant areas be excised from the reserved lands, that recommendation in our view, is not binding on the first appellant. Under the Ordinance, the authority empowered to approve any mining lease is the first appellant — see ss 2 and 7. In the exercise of their discretion, the authority is not bound by the recommendations of the third appellant, or any other body or department.

[91] We, thus, do not see the decisions reached as decisions in breach of the rules of natural justice nor do we find any procedural impropriety as alleged. In *Malaysia Airline System Bhd v Wan Sa' adi @ Syed Sa' adi bin Wan Mustafa* [2015] 1 MLJ 757; [2015] 1 CLJ 295, the Federal Court explained when procedural impropriety is properly and appropriately established, with a caution from the apex court not to 'unreasonably and unnaturally extend' the principles of natural justice so as to frustrate the process of law as emplaced by statute law; in the present appeal, by the clear provisions of the Ordinance:

> [24] Now, procedural impropriety is said to have occurred when a decision maker (including an administrative tribunal or an arbiter) empowered by public law in the form of legislation or common law (that is, prerogative power), in coming to a decision (including his refusal to make a decision) with consequences affecting 'some person or body of persons', fails:
>
> 1. to observe the 'basic rules of natural justice'
> 2. 'to act with procedural fairness towards the person who will be affected by the decision'; or
> 3. 'to observe procedural rule that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice'.

[92] There cannot be procedural impropriety where all that the appellants have done is to observe the procedural rules of the Ordinance. See also *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

[93] The basic rules of natural justice require the appellants to act fairly and just what that means 'should be considered on a case to case basis depending on the facts and circumstances governing the relationship of those involved prior to the decision being made', per Richard Malanjum CJ (Sabah and Sarawak)

(as His Lordship then was) in *Malaysian Airline System Bhd v Wan Sa'adi Wan Mustafa* at p 305; and also *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan*.

[94] The facts in this appeal have revealed that the relationship and the circumstances do not 'cry out' for an inference of breach of the rules of natural justice or even the presence of procedural impropriety of any degree.

CONCLUSION

[95] For all the reasons stated, we find this an appropriate case for appellate intervention and the appeal must be allowed with the consequential order that the decision of the High Court is to be set aside. The same, however, cannot be said for the cross-appeal which we dismiss.

[96] In the matter of the cross-appeal, the respondent had urged this court to vary the order of the High Court. Since the appeal has been allowed and the entire decision of the learned judge has been set aside, the order of reconsideration by the appellants, an order in the favour of the respondent, no longer arises.

[97] In any event, there is no merit in the cross-appeal. The respondent had contended that the learned judge ought not to have directed the first appellant to reconsider and re-determine the four applications for mining leases. Instead the learned judge should have ordered the first appellant to approve the grant of its four mining leases over the smaller area as proposed in its letters of appeal subject to the terms and conditions as recommended by the director. This would then avoid the appellants from having the opportunity to 'reconstruct' another reason to reject the applications. There is no basis for such an argument.

[98] Finally, we make no order as to costs.

Appeal allowed; decision of High Court set aside; cross-appeal dismissed with no order as to costs.

Reported by Dzulqarnain bin Ab Fatar